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Supreme Court of the United States

OCTOBER TERM 1961

No. 135

ESSO STANDARD OIL COMPANY, a corporation,
Petitioner,

against

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 990

ESSO STANDARD OIL COMPANY, a corporation,
Petitioner,

against

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on December 13, 1961 which reversed a judgment in favor of petitioner. Petitioner's judgment was based on a jury verdict in its favor. Petitioner filed a petition for rehearing which the Court of Appeals denied on February 22, 1962.

The reversal by the Court of Appeals was based on a re-examination of the facts found by the jury and by virtue of a United States Statute which was not in effect at the time of the acts complained of by the respondent. Both of these holdings were contrary to the Constitution of the United States. There were other errors hereafter set forth.

OPINION BELOW.

The opinion for the Court of Appeals for the Fifth Circuit is attached to this petition, pages A-3—A-14. It is reported at 297 F. 2d 411.

The decision of the Court of Appeals denying petitioner's petition for a rehearing has not yet been reported. However, it did no more than deny the petitioner's petition without opinion.

There was no opinion by the trial judge.

Jurisdiction.

As heretofore stated, the judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 13, 1961, and the petition for rehearing was denied on February 22, 1962. The jurisdiction of this Court is invoked under Section 1254(1) Title 28 USC.

Statutes Involved.

Article 1, Clause 9 of the United States Constitution.
Fifth Amendment to the United States Constitution.
Seventh Amendement to the United States Constitution.
46 U.S.C. 688; 710.
18 U.S.C. 2277.
15 U.S.C. 1241-1244.

The foregoing Constitutional Amendments and statutes are fully set forth in the appendix—pages A-15 to A-19.

Questions Presented.

1. May a court of appeals re-examine the facts on which a jury rendered a verdict in favor of the defendant, petitioner here, and reverse the judgment in favor of the defendant and order a new trial because the Court of Appeals differs from the fact findings made by the jury? Does not the Seventh Amendment to the Constitution bar such re-examination and retrial?

2. May a court of appeals hold petitioner negligent for legal acts done by its servants on the basis that similar acts were proscribed by a statute enacted long *after* the petitioner's servants acted?

3. May a court of appeals reverse a judgment in favor of petitioner for an alleged error which is not in the record? Respondent never urged the alleged error and because of this she was barred from raising it on appeal. (Rule 51, Federal Rules of Civil Procedure).

4. May a court of appeals reverse a judgment in favor of petitioner on the basis of an alleged error in the charge to which the respondent took no exception? (Rule 51, Federal Rules of Civil Procedure).

5. May a court of appeals order a new trial in an action for damages for wrongful death of a seaman (46 U. S. C. 688) on the basis of "unseaworthiness" in the face of the rulings of this Court that no such cause of action exists?

6. Does the mere possession by a crew member of a pen knife whose blade opens on pressing a button make a shipowner absolutely liable under Title 18 U. S. Code 2277 where the statute does not forbid the possession of such knife, and where, even if the statute did forbid it, there was no showing that the seaman possessed it without the consent of the master or the owner of the vessel.

7. Should not *certiorari* be granted where two circuits have reached opposite conclusions with respect to the quality of the person possessing a knife on shipboard? In

the case at bar mere possession was held an act of negligence on the part of the shipowner, despite the jury's verdict to the contrary, whereas in *Connolly* v. *Farrell Lines, Inc.*, 268 F. 2d 653 (CA 1-1959) mere possession of a knife did not make the seaman "unseaworthy" and the vessel owner liable for assault.

8. May a court of appeals reverse a judgment in favor of petitioner after a verdict of the jury on the ground that there was an erroneous charge in respect of contributory negligence when no exception was taken thereto by respondent's counsel? (Rule 51, Federal Rules of Civil Procedure).

9. Is not an experienced seaman, who has petty officer's status, guilty of negligence where he abuses, manhandles and uses obscene language to an 18 year old messman thereby provoking an assault on himself?

The Facts.

It must be stated at the outset that the facts set forth in the opinion of the Court of Appeals do not coincide with the facts which transpired on the trial. A critical examination of the facts, as stated in this opinion, is set forth under IB.

Respondent's intestate, Philip Fall (hereafter called Fall) died as a result of an altercation with Jimmy Murphy. Both were crew members of SS. *Esso Augusta,* Fall being the electrician and Murphy, a crew messman. The vessel was docked in Baton Rouge, Louisiana, at the Esso Standard refinery at the time of the events in suit.

The altercation was the culmination of abusive treatment by Fall of Murphy beginning some time before the date of the clash between them. 11a, 16a, 41a, 45a, 85a.*

Originally the complaint contained a count based on alleged "unseaworthiness" but this count was stricken as insufficient in law on the threshold of the litigation.

On the trial however, the trial judge allowed the respondent the opportunity to produce medical evidence of pain and suffering so as to seek recovery for such damages under the "unseaworthiness" doctrine. After taking an ample adjournment, respondent's counsel informed the court that he was unable to produce any proof of pain and suffering so this cause of action failed for lack of proof. (442, 502).

Fall was 46 years of age and had about 14 years of sea service. [211]. Murphy, his alleged assailant, was 18 years of age and had only about 8 months of service. 2a.

Murphy came from a religious background and received part of his formal education in church academies. 2a, 18a. His reputation was that of a polite, quiet, unassuming boy. 32a, 33a. On the contrary, Fall was prone to pick on his inferiors. 85a.

When his ship was in Mobile, Alabama, Murphy purchased a pocket knife (pltf's Ex. 2) in a store where he noticed it in the window. 17a. He bought it because he had always wanted one and because he thought it was "pretty". 17a. The blade of the knife operated by pressing a button and is popularly known as a switch blade. This type knife has earned an undeserved reputation in areas where there is a large amount of juvenile delinquency.

* Unbracketed references are to defendant's appendix in the Court of Appeals. Bracketed references are to the stenographer's Transcript of the Proceedings.

However, it was nothing but a pocket knife, and very useful to Murphy as a tool. 17a, 18a. Murphy made no attempt to conceal the knife, keeping it on a makeshift table alongside his bunk. 8a.

The events in suit occurred on April 24 and April 25, 1957. Prior to this time Fall had been mistreating Murphy —"treating me like a dog". 85a. There is no evidence that this situation was known to any of the ship's officers but Fall did have a reputation for being a "know-it-all". 16a.

The SS. *Esso Augusta* was loading cargo at the Esso refinery docks, some 1½ miles from the gate of the refinery enclosure. Crews of vessels docked within the enclosure, traveled by a company jitney or bus from a "turn-around" point near the dock to the gate. There they were screened by security guards, both to and from "town". Murphy went ashore on April 24, 1957, about 7 P. M., after the day's work was done, 9a, and visited various bars. 10a. At one of these bars he engaged in conversation with one of the owners, a woman referred to as "Mary". 11a. There were other women in the bar whom Murphy described as "bar flies". 19a.

While Murphy was in conversation with Mary, Fall entered the bar and seeing Murphy, accosted him. Fall took hold of Murphy and jerked him around demanding "what the hell are you doing talking to my girl". 11a. A scuffle ensued which was broken up by Mary. 19a.

Later on Murphy returned to the refinery gate. Fall also was present but they had not traveled together. They entered the jitney provided by the company. Murphy sat on the front seat with the driver and Fall sat in the rear. 41a. As the jitney proceeded to the ship, it made a sharp turn causing Murphy to slide off the seat. 41a, 42a. Whereupon, Fall said to Murphy "don't fool around with the

driver". 45a. Instead of "fool" a much more seaman-like term was used. 45a. A wordy argument ensued and lasted until the jitney reached the turn-around point where the men left it. 41a. No blows or threats were exchanged but the men continued to argue. 42a.

The jitney driver and two of the security guards intervened and quieted the men. 42a. The guards exercised control over seamen returning to their ships and would not permit a drunken or disorderly seaman to return to his ship. A drunken seaman was kept at the gate until he sobered up. 59a. A disorderly seaman was turned over to the sheriff for incarceration. 58a.

Neither Murphy nor Fall exhibited any signs which made it necessary for the guards to bar them from their ship or to report them to the ship's officers: 59a. Both were escorted to the ship without difficulty. 44a. The guards said that the men probably had been drinking but neither was drunk. 44a. They did not stagger and went quietly to the ship. 44a, 60a. Indeed, Murphy said he was "going to bed". 44a.

The guards were experienced men who had dealt with seamen and their arguments on many prior occasions. 45a. One of them had been a police officer. 39a. They judged that the wordy argument between Fall and Murphy was over and that no trouble was to be anticipated. 44a, 46a, 59a. Seamen's arguments are common occurrences when seamen return from ashore. 43a, 37a, 60a. The one between Fall and Murphy was not any different from the others. 60a.

When Murphy boarded the ship he went to his room, passing through the messroom in order to do so. 26a. Third Engineer Schuler was seated in the messroom having a cup of coffee. Soon thereafter, at about 2:30 A. M.,

Murphy returned through the messroom at a fast pace. 27a. Schuler was still seated in the messroom. Murphy was in the messroom on this second occasion about 2 seconds but Schuler noticed, as Murphy was almost through the room, that he held a closed knife in his hand. 33a. Murphy muttered something about getting the electrician. 27a. Schuler asked Murphy what he was doing with the knife but evidently Murphy did not hear him. 27a.

Because of Murphy's good reputation and the fact that he was an unusually quiet boy, Schuler did not at once conclude that Murphy meant any harm to anyone. 32a, 33a, 34a, 37a. However, he immediately got up and followed Murphy arriving at Fall's room less than 30 seconds after Murphy had left the messroom. 27a, 28a, 33a. At Fall's room he found Murphy and Fall grappling. 28a. Murphy held a knife in his hand. 28a. At the first opportunity, Schuler stepped in and seized Murphy's arm, whereupon Fall ran out of the room. 29a. Schuler told Murphy to drop the knife which he did. It was only then that Schuler realized that Fall might have been injured. 29a.

There was no direct evidence as to how Fall was injured. There were no witnesses except Fall and Murphy. Fall lapsed into unconsciousness before he could give any explanation. Murphy testified in his deposition that he could not remember any of the details. 12a.

However, in a statement which he gave to one Sliman, chief investigator for the district attorney of Baton Rouge, Murphy gave the following details: 85a

> "When I got my knife I immediately went to the electrician's room.
>
> I was going to his room to scare him and I brought my knife in case he started anything. I wanted to talk it over.

Just as I got to his door he opened the door and he went for me. As far as I know I had the knife in my hand when he came at me, but it was closed.

He grabbed me and we tussled. I remember falling on the couch. I guess it was then I opened the knife. I remember stabbing at him but I didn't know whether I hit him or not. I didn't mean to stab him. I went to his room to talk things over, and everything happened so fast it's not too clear in my mind."

This statement was received in evidence (Deft. Ex. D) not for proof of the facts but to show that at one time Murphy did have a recollection of what had transpired. [299].

After Fall left his room following the scuffle he went along the deck and up the gangway to the dock where he collapsed. Immediate treatment was rendered and an ambulance from the refinery took him to the gate where he was transferred to another ambulance. However, he died on the way to the hospital.

All seamen carry knives. 62a, 64a. They are necessary tools for the deck seamen and valuable to other crew members in the event of a collision or other catastrophe where a seaman might become entangled in the ship's lines. 62a, 64a.

In any event, the knife is not a sheath knife which is prohibited by statute, but a pocket knife. As was pointed out on the trial, almost any heavy object can be a lethal weapon if used for that purpose. There are any number of such objects on board a vessel, such as marlin spikes, wrenches, hammers, etc., which, if used as weapons, can cause serious injury and death. The same is true of the assortment of knives which is customarily kept in the galley.

63a. These are even more dangerous than pocket knives. 63a, 64a.

On the whole, the facts presented below clearly justify the jury's finding that the petitioner was not guilty of any negligence and that Fall's injuries were provoked by him through his persistent mistreatment and abuse of Murphy. Assuming that Murphy did stab Fall, it was not foreseeable on the part of petitioner's agents and their acts were in no respect responsible for the result as the jury found.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAD A CONSTITUTIONAL RIGHT TO THE PROTECTION OF ITS JURY VERDICT. REVERSAL OF THE JUDGMENT IN FAVOR OF PETITIONER BASED ON A RE-EXAMINATION OF THE FACTS FOUND BY THE JURY BY THE COURT BELOW VIOLATED PETITIONER'S RIGHTS. PETITIONER'S JUDGMENT SHOULD BE RE-INSTATED.

A.

It can be seen from the analysis of the facts (B, hereof) re-examined by the court below that there was an unconstitutional usurpation of the function of the jury. The court of appeals had no such right. Certainly it had no right to find facts differently than were implicit in the findings of the jury. Petitioner was entitled to all of the favorable inferences which arose from the verdict in its favor. The court ignored this principle which is well recognized.

This Court recently had occasion to reiterate the limitation of a court of appeals in respect of findings by a jury. In *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd., et al.*, 369 U. S. 355. This Court said with respect to the fact finding by a court of appeals page 358:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

and again at page 364:

> "So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 567. If that was the jury's view of the facts, then petitioner plainly would not be liable under its warranty. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360. Cf. *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 446."

In *Kirstner* v. *Atlantic Greyhound Corp.*, 190 F. 2d 422 the court said at page 423:

> "The appeal presents no ground upon which plaintiff can ask relief. It was argued with much

> force that the jury reached a wrong conclusion in its verdict; but this involves a pure question of fact which is not reviewable by us on appeal. The Seventh Amendment to the Constitution expressly provides that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. The motion to set aside the verdict and grant a new trial was a matter resting in the sound discretion of the trial judge; and it is well settled that action thereon cannot be made the basis of relief on appeal in the absence of abuse of discretion, which is not present here."

The cases holding the same principle are legion. One more pertinent citation is found in *Liberty Mutual Insurance Company* v. *Thompson*, 171 F. 2d 723, where the court said at page 726:

> "Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts where the evidence is such that reasonable men may fairly differ as to whether an employee is disabled from an accidental injury or an occupational disease, the right of trial by jury is preserved by the Seventh Amendment, 'and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. This means that an appellate federal court should not disturb the jury's findings of fact as to the accidental cause of appellee's disease, if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express

an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury. The judgment appealed from is affirmed."

The unjustified conclusions with respect to the facts which the court below made on the re-examination of the facts shows the soundness of the proscription contained in the Seventh Amendment. As is noted more and more frequently these days, there is a tendency on the part of courts to give weight to circumstances which will resolve a litigation favorably to seamen. This is not a practice which can be justified.

The judgment in favor of petitioner should be re-instated.

B.

FACTS STATED ERRONEOUSLY IN THE OPINION OF THE COURT OF APPEALS.

Petitioner respectfully points out, seriatim, the erroneous statements of fact by the court in its opinion filed herein. These statements are in italics.

Page A-4. *Murphy's immediate superior was "not sure" whether Murphy's knife was a switchblade knife.*

The testimony does not support this. On page 64a, the testimony of Montero, Murphy's superior, is set forth. Montero there testified that he could not tell what type of knife it was and did not know whether it was a plain knife or a pushbutton knife.

Page A-4. *The court implies that the description of Murphy as polite, quiet and unassuming is not borne out by the record because of what took place on one occasion, viz, the night of the stabbing.*

The testimony with respect to Murphy's quiet character was established, without contradiction, by all of the witnesses who testified about it. Murphy's good reputation was important from the point of view of the notice which petitioner's employees had with respect to Murphy's activities. It is unjust to imply that Murphy's character was other than polite, quiet and unassuming, except on this one particular occasion when he was goaded into anger by Fall.

Page A-4. *Murphy went ashore without eating.*

Undoubtedly, the intended implication is that he drank on an empty stomach. The record is otherwise, 9a.

Murphy testified that he left the vessel around 7:00 o'clock in the evening "after supper".

Page A-4. "* * * *when the Esso bus reached the refinery* * * *"*

The bus in which the men were riding when Murphy fell off the seat, and when Fall abused him about it, was the refinery bus which traveled wholly within the refinery. There was no dispute about that.

Page A-4. *Murphy and Fall scuffled after leaving the bus.*

There was no scuffling or no wrestling, which "scuffling" implies. The men approached each other but did not strike or take hold of each other, 42a, 58a, 60a, 61a, 63a.

Page A-5. *Defendant's witnesses had lower standards for judging drunkenness than police standards.*

There was no support in the record for this statement. Indeed, the record shows that one of the guards who made the determination was a former police officer, 39a.

Page A-5. *"Schuler followed, but not soon enough."*

What this sentence intended to imply is not clear. If it is to express the idea that Schuler delayed in following

Murphy, it is not supported by the evidence. The fact is that Schuler got up immediately to follow Murphy. True, he arrived late, but he arrived less than 30 seconds after Murphy had left the messroom where Schuler had been sitting, 33a.

Page A-5. *"Defendant argues that Fall persistently mistreated Murphy."*

Petitioner did not make this contention, 27a, 28a, 33a. It contended that Fall was prone to pick on his inferiors, 85a, treated Murphy like a dog, 85a, and had a reputation for being a "know it all", 16a. Fall had in fact physically attacked Murphy ashore in Mary's Bar, 11a, and later, when riding back to the ship by bus, Fall started an argument with Murphy, 45a.

Page A-5. *"The court also struck the allegations in the complaint which contended that the decedent's claim for pain and suffering caused by unseaworthiness survived in the estate."*

Originally, Judge Simpson did strike this claim but on the trial restored it, (442). Judge Simpson allowed respondent the opportunity to produce medical evidence of pain and suffering. After giving respondent's counsel ample adjournment, Judge Simpson was advised by him that respondent was unable to produce any proof of pain and suffering. Mr. Rassner, representing the respondent, stated, "The doctor said that in a case such as this—I explained to him what had happened—the only people that could give an opinion would be the people who actually saw the man. He said he couldn't give expert testimony. He said, "There is no medical way that I can do it' ", (502).

Respondent's counsel did not press the matter any further and it was not submitted to the jury inasmuch as there

was no proof of pain and suffering. Furthermore, respondent did not ask that it be submitted to the jury nor make any proffer of what he had hoped to prove under the proposed amendment to the complaint.

Page A-6. *Murphy's knife was unsuitable as a screwdriver.*

Nonetheless, Murphy used it as a screwdriver and so testified, 17a. It is not contended that a knife such as Murphy possessed would not be "highly suitable for stabbing an opponent in a fight". Nor would a hammer be unsuitable if it was used as a club to crack open a skull. This merely brings back to mind what the petitioner contended all along: That this ship, and any ship for that matter, carries by necessity a number of devices and instruments capable of delivering a lethal blow, if used for that purpose, ranging from coffee cups to wrenches, fire axes and burners.

Page A-6. *"Half of the case collapsed when the trial judge dismissed the complaint as to unseaworthiness".*

It is true Judge Simpson dismissed the complaint as to unseaworthiness, but not on the trial. The dismissal took place on the threshold of the litigation, prior to the time petitioner filed its answer, and before any discovery was undertaken by respondent.

Page A-6, *"The other half fell apart during the trial when the district judge made it clear that, as a matter of law, he regarded the knife as a useful tool and not a dangerous weapon per se."*

Judge Simpson made no such finding and said that he would permit the jury to determine whether it was a dangerous weapon. This statement was made during the charge conference when he was correcting one of the requested charges submitted by the respondent.

Page A-7. *The court refused to give any charge referring to the knife as a dangerous weapon and gave no instructions as to dangerous weapons.*

Judge Simpson did not refuse to give any charge referring to the knife as a dangerous weapon. The failure of Judge Simpson to charge as to dangerous weapons was not called to his attention as required by Rule 51 F. R. C. P. and if there were any error in this respect, respondent waived it and cannot now be heard to complain, (469).

Page A-7. *The court withdrew the dangerous weapon issue from the jury.*

That issue was not withdrawn, 50a. Judge Simpson said that he was leaving it for the jury to determine, (469). He did not allow the jury to determine the meaning of "dangerous weapon" under the statute; that being a determination of the law which is reserved to the court and not the jury. After the quotation of the charge ending on page 7 of the opinion, Judge Simpson charged the jury as follows:

> "The defendant, Esso Standard Oil Company, is responsible for the acts of its servants in the circumstances and if there was there—if there were danger flags flying that they should have seen and anticipated that this electrician, Mr. Fall, was in danger and if they failed under those circumstances to take steps that a reasonably prudent person would have taken, then you should find that the Esso Standard Oil Company was negligent. It is clear, it seems to me from the evidence, that nobody did anticipate it, but the question is should they have? Were they in the knowledge of circumstances that a reasonably prudent person would have taken to mean that there was danger to the electrician, Mr. Fall, and taken steps to prevent it? That is

> the real issue of negligence which is submitted here and which you gentlemen must consider in this case: Was this assault reasonably to have been anticipated from the attendant circumstances? And you should weigh all the circumstances; go back to everything that had occurred that was known, or reasonably should have been known to the servants and agents of the defendant. Was it negligent for further steps not to have been taken by the men at the gate to admit them, or by the jitney driver, or by the man there at the security office down on the dock side, as I recall the testimony, or by some personnel aboard, including, specifically, Mr. Shuler? If a reasonably prudent person under all the circumstances would have taken further steps and such further steps would have been effective to have prevented the injury and death of Mr. Fall, then you should make a finding of negligence." 72a.

Again, if respondent felt aggrieved by the failure of Judge Simpson to give an instruction with respect to the "dangerous weapon issue", she should have called it to his attention, as the rule requires.

Page A-8. *A seaman may not bring an axe aboard a ship.*

No authority is cited for this. It is a matter of common knowledge that most alleyways on ships are equipped with fire axes.

Page A-8. *A messman cannot lawfully bring a switchblade knife aboard a ship nor "making bad matters worse, keep it on a table near his bunk, presumably for instant use."*

At the time of this occurrence, there was no statute specifically prohibiting the possession of a switchblade knife aboard a vessel. The implication in the court's language that Murphy kept a switchblade knife alongside of his bunk

for instant use as a weapon has no support in the evidence. On the contrary, his keeping it alongside his bunk, in the open, is a clear indication that he never had any intention of using it as a weapon, otherwise he would have kept it hidden so his intended victims would be unaware that he possessed it. Morever, his character and deportment on board the vessel, 2a, 18a, 32a, 33a, does not support the court's unjust implication that he was ready, willing and able to commit violence with a switchblade knife.

Page A-13. *"At the trial the plaintiff's counsel saw the chief mate in the courtroom and called him as a witness."*

There is nothing in the record which supports this statement. It is true respondent's counsel called the chief mate as respondent's witness. Why he did so is a matter for conjecture. He had no need to call the chief mate as respondent's witness because he already had the mate's testimony, as an adverse party, which he could have read to the jury. The probability is that it was trial strategy that backfired.

Page A-13. *"The plaintiff should not be bound by the chief mate's testimony and the mate should be subject to cross examination."*

This is a legal matter which is argued in the brief. Sufficient to say now, respondent is bound by the testimony of an adverse witness if she offers his testimony in court.

Page A-13. *Nelson's deposition testimony showed the practice in the merchant marine to consider the switchblade knife as a dangerous weapon.*

Nelson did not so testify. What he said was that all seamen have knives but in the case of a messboy he would report possession of a switchblade knife to the Master, (171) 49a.

Page A-14. *"Fall could not have foreseen the vicious attack Murphy made upon him with a dangerous weapon."*

There is no testimony whatsoever in the record as to any attack made upon Fall by Murphy (much less a vicious one); to the contrary, according to Murphy's own statement, Fall was the aggressor and first attacked Murphy ashore, in the bus and on the ship. (Murphy's statement, def. ex. D; 83a-85a). Murphy said, "Just as I got to his door he opened the door and he went for me. As far as I know I had the knife in my hand when he came at me, but it was closed."

In stating that there was a "vicious attack" with a "dangerous weapon" the Court below ignored the evidence and relied on its faculties of imagination. Moreover, the Court thus belied its own statement (page 12A) that these matters were for the jury's determination.

It is a fundamental law that a judge, be he trial judge or appellate judge, may not substitute his determination of the facts for that of the jury, United States Constitution Amendment VII.

Implicit in the jury's verdict of "not guilty" were findings that the petitioner was not negligent in failing to prevent Murphy and Fall from boarding the vessel, nor was Schuler negligent; and in general, it was not negligent in failing to prevent the death.

Under the law, all of the issues must be resolved in the light most favorable to the party who receives the verdict. The opinion of the court below ignores this principle and proceeds to make findings which are inconsistent with those of the jury and even inconsistent with the actual testimony.

See, e.g., *Southern Farm Bureau Casualty Ins. Co.* v. *Palmer,* 263 F. 2d 206, (CA 5, 1959); *Reid* v. *Nelson,* 154 F. 2d 724, (CA 5, 1946); *Home Ins. Co. of New York* v. *Tydal Co.,* 152 F. 2d 309 (CA 5, 1946).

II.

THE CONCLUSIONS OF THE COURT BELOW WITH RESPECT TO PETITIONER'S NEGLIGENCE BASED ON A STATUTE NOT IN EXISTENCE WAS ERROR.

The court in its opinion, A-8, in language characteristic of an advocate rather than a court says: "Two federal statutes, read together, are dispositive of this case. One of these, the Switchblade Act; was not called to the attention of the district judge, an omission that may account for the tenor of the charges; in a colloquy with the attorneys, the district judge commented on the statutory prohibition of sheath knives and the absence of a statute defining a switchblade as a dangerous weapon".

Later, page A-9, the court notes that the Switch Blade Act was passed subsequently to the event in the case at bar but then says: • • • "In these circumstances it only makes sense to resort to a later statute, even one not directly related to the statute to be construed."

> Again, page A-12, the Court says • • • "We say, as the Act indicates, that a fair and reasonable interpretation of the term 'dangerous weapon' permits a jury to find that Murphy's knife came within the statutory meaning."

What the court is saying, in the first instance, is that on its re-examination of the facts found by the jury it differs from the facts found by the jury which the Constitution says the court may not do. In the second place it says that the quality of the acts of petitioner's servants should be judged by a penal statute enacted *after* the event. This, of course is holding petitioner guilty *ex post facto*.

The Switch Blade Act is a penal statute. Its effect may not be enforced with respect to events which took place before its enactment.

Calder v. *Bull*, 3 Dallas 386.

Certainly it cannot be used as a basis for the interpretation of another statute which had been the law for 90 years, previously. (The "Dangerous Weapon" Statute, 18 U. S. C. 2277 enacted 1948—the "Sheath Knife" Statute, 46 U. S. C. 710, 1903.)

With respect to the Sheath Knife Statute, one thing is very clear. The Statute does not forbid the *possession* of a sheath knife. It merely forbids the *wearing* of it on shipboard. A seaman, therefore, would not be violating the statute, if he kept one on a makeshift table alongside of his bunk in a place similar to where Murphy kept his pen knife.

Apparently Congress does not consider a sheath knife as a dangerous weapon since in the Congressional hearing which preceded the adoption of the Switch Blade Act, Congress referred to the "conventional sheath" knife as being recognized and generally employed by hunters, fishermen, sportsmen and others. Cf. Opinion of the court below pp. A-11 and A-12. On the trial of the instant case, not only did counsel admit to having switch blade knives but the court itself said it had one and found it very useful.

With respect to the Dangerous Weapon Statute, it is significant that dangerous weapons of all kinds may be taken aboard a vessel provided it is done so with the consent of the "owner or master of said vessel".

A common rule of interpretation applies to all of these Acts. The rule is that a criminal statute is not to be read

expansively to include what is not plainly embraced within the language of the statute since its purpose, fairly to apprise men of the boundaries of prohibited action, would then be defeated. *Cordell* v. *U. S.*, 335 U. S. 345 Reh. Den. 335 U. S. 900, and 336 U. S. 97; *Schmokey* v. *U. S.*, 182 F. 2d 937; *U. S.* v. *Resnick*, 299 U. S. 207, 209; *Smith* v. *United States*, 360 U. S. 1.

It should be noted also that under Article 1 of the Constitution empowering the legislature, it is by Clause 9, ¶. 3, forbidden to Congress to make any *ex post facto law.* Moreover the Fifth Amendment to the Constitution provides that persons shall not be deprived of property except by due process of law. To deprive the petitioner here of its property on the basis of *ex post facto* laws would certainly be depriving the petitioner of its property without due process.

III.

THE COURT BELOW WAS IN ERROR IN STATING THAT THE TRIAL COURT HAD ERRONEOUSLY WITHDRAWN FROM THE JURY THE QUESTION OF WHETHER THE PEN KNIFE WAS A DANGEROUS WEAPON. IT WAS NOT WITHDRAWN FROM THE JURY'S CONSIDERATION NOR DID RESPONDENT'S COUNSEL ASK THAT THE JURY CONSIDER WHETHER IT WAS OR WAS NOT DANGEROUS.

The sole contention of the respondent in respect to the knife was that a seaman was prohibited by the "Dangerous Weapon" Statute from possessing the knife and that, therefore, his possession of it involved the shipowner in negligence because it did not discover that the seaman had the knife and did not remove it from his possession.

The respondent's counsel did not seek a charge that the jury determine whether or not the knife was a dangerous

weapon. In the charge conference with counsel, the court said on two occasions that the question of whether a knife was a dangerous weapon, was for the jury to determine (469, 475). The respondent's counsel argued at length to the jury that the knife was dangerous and that it was forbidden by statute (81a, 82a). This argument alone establishes counsel understood that the question of whether the knife was a dangerous weapon had not been withdrawn. He had been advised by the court previously "I think you can argue that it is dangerous * * *" (523).

In any event, after the court completed its charge respondent's counsel was asked by the court "I would ask you first if there is anything additional". To which respondent's counsel replied "No sir—your Honor—no objection". Thus respondent's counsel told the court in language as clear as one could make it that there was nothing additional he wished the court to charge and that he had no objection to what the court had charged.

For the court below to say in its opinion that the trial court had withdrawn from consideration of the jury whether or not the knife was a dangerous weapon is a plain distortion of what actually took place at the trial.

Rule 51, of the Federal Rules of Civil Procedure was intended to expedite the administration of justice and to afford a trial judge adequate opportunity for correcting any errors, or omissions which may have occurred in his charge. The significance of this may be gleaned from *Curko v. W. Spencer & Son Corporation*, (1961 C. A. 2), 294 F. 2d 410.

There defendant had a verdict and plaintiff appealed on the ground that the court had refused a charge, which under the evidence, he was entitled to have. The Court of Appeals

agreed that the facts in the case justified a charge as requested but nonetheless affirmed on the ground that plaintiff's counsel had failed to point out to the court the significance of the charge and its relevance to the facts proven.

In the case at bar, there was neither a requested charge nor an objection to any omission. If respondent felt aggrieved either by a wrong charge or an omission to charge, he was required under F. R. C. P. 51 to make known his position clearly so that if correction was necessary it could have been done. Certainly, the administration of justice was not furthered in the instant case, where the trial court was reversed for an alleged error in its charge which error was not called to the court's attention and no exception was noted.

In the circumstances, the reversal of petitioner's favorable judgment was a plain invasion of its constitutional rights which this court should correct by reestablishing the judgment.

IV.

THE REMARKS OF THE COURT BELOW WITH RESPECT TO UNSEAWORTHINESS ARE CONFUSING, AND IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals in its opinion A-14 refers to a supposed right to recover damages for wrongful death under the doctrine of "unseaworthiness". The language is so confusing that should this case have to be re-tried the trial judge is bound to be at a loss to determine whether he must follow the seeming mandate of the Court of Appeals or whether he must look higher and follow the precise determination of this Court. It is submitted that a

trial judge should not be left as a rudderless ship in a storm without a compass.

In *Kernan, Administrator* v. *American Dredging Co.*, 355 U. S. 426, this Court spoke words as clear as the English language can make them that • • • "[T]he remedy for unseaworthiness derives from the general maritime law and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or negligence. *The Harrisburg*, 119 U. S. 199 • • •".

In the face of this language, which was quoted in petitioner's brief, the Court below has labeled this Court's determination as "anomalous and archaic."

While the conception of the court below with respect to matters in derogation of the common law may be sincere nonetheless, it is not legal and should be disregarded.

As already stated by this Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, the entire doctrine of unseaworthiness is of doubtful legitimacy. The doctrine ought not to be further extended.

V.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE DIVERGENCE OF COURTS OF APPEALS ON A MATTER OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A well established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by another circuit court whose judgment is final in the absence of Supreme Court review.

In *Connolly* v. *Farrell Lines, Inc.*, 268 F. 2d 653 (1959), the Court of Appeals for the First Circuit held that a seaman who committed an assault was not unseaworthy because

he had concealed one of the ship's knives under his pillow. Likewise the Court held that the shipowner was not negligent in continuing to employ the seaman after he had been found to have concealed a ship's knife under his pillow. There was no evidence that he was known to be a source of peril nor was there any evidence that he had previously shown any belligerent nature or had shown a proclivity for assaulting people.

In the case at bar, the facts which might be charged against the shipowner were far less grave than those in the *Connolly* case. The court below held that a seaman who kept a pen knife, albeit a switch blade, exposed to view was "unseaworthy" and the shipowner negligent because it did not discover the knife and confiscate it. Murphy, the seaman involved, had a reputation for being a quiet, unassuming and unusually polite boy, having had a religious education. 32a, 332, 2a, 18a. There was no evidence to show that he was a source of peril or had shown any tendency of a belligerent nature or a proclivity for assaulting people.

Obviously the decision of the First Circuit is correct. The decision to the contrary puts an unjust burden on a shipowner and implicitly requires a shipowner to perform an obligation which the statute (18 U. S. 2277) does not.

VI.

THERE WAS NO ERROR IN THE CHARGE IN RESPECT OF FALL'S NEGLIGENCE. MOREOVER NO EXCEPTION WAS TAKEN TO THE CHARGE.

As indicated in III, under Rule 51 of the Federal Rules of Civil Procedure, it is necessary that exception be taken to an erroneous charge before the reversible error can be charged, and reversal obtained on the basis of the error.

It must first be said that there was utterly no evidence before the jury as to how Fall suffered his fatal wound. This was left entirely to the conjecture of the jury which could very well have found that the wound was suffered when Fall attacked Murphy, as Murphy first said in his statement to the district attorney of Baton Rouge (83a). Even it were otherwise, it would not exculpate Fall in respect of negligence.

This court has held that an assault is negligence, *Jamison* v. *Encarnacion*, 281 U. S. 635. It follows that if an assault is negligence, provocation to an assault is also negligence. The fact that a period of time intervened between Fall's undenied provocation to assault and the alleged assault itself is of no moment. *Boudoin* v. *Lykes Bros. SS Co.*, 348 U. S. 336, page 339 quoting *Jones* v. *Lykes Bros. Steamship Co.*

> "'All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and *some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours.* Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the "disposition" of "the ordinary men in the calling"' Jones *v.* Lykes Bros. Steamship Co., supra, 1953 A.M.C. 1012, 204 F. (2d) at 817." (emphasis supplied)

The question of Fall's negligence was properly before the jury. It is correct to conclude that the jury found Fall negligent. The court below had no basis for saying otherwise.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE WRIT OF CERTIORARI HEREBY SOUGHT SHOULD BE GRANTED AND THAT THE JUDGMENT OF THE COURT BELOW BE REVERSED AND THE JUDGMENT IN FAVOR OF THE PETITIONER BE RE-INSTATED.

If this court does not summarily grant this relief and the re-instatement of the jury's verdict then it is respectfully requested that the court order a review of all the issues presented.

Dated: May 18, 1962

Respectfully submitted,

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